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No. 83-308

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing the district court's dismissal of an indictment growing out of the undercover operation known as Abscam.

On July 15, 1980, petitioner and two others were charged in an indictment returned in the United States District Court for the District of Columbia with conspiracy to commit bribery, in violation of 18 U.S.C. 371; bribery, in violation of 18 U.S.C. 201(c); and interstate travel to commit bribery, in violation of 18 U.S.C. 1952. The jury found petitioner guilty as charged. Following the jury verdict, on May 13, 1982, the district court granted petitioner's motion to dismiss the indictment and entered a judgment of acquittal in his favor because it concluded that the actions of government officials in furtherance of Abscam were so outrageous that his prosecution was barred by principles of due process (Pet. App. 39a-65a; 539 F. Supp. 363, 370-377).

The court of appeals reversed (Pet. App. 1a-35a), remanding the case to the district court with instructions to reinstate the indictment and verdict of the jury, and for further proceedings.

Petitioner contends (Pet. 4-11, 13), in six related arguments, that the government's conduct of its Abscam investigation was so outrageous that due process barred his prosecution. He also contends (Pet. 12) that the court of appeals should have remanded the case to the district court for a determination of the scope of its ruling. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his post-trial motions. If, after imposition of sentence by the district court,[2] the court of appeals were to reverse petitioner's conviction and remand for a new trial because of trial error, his claims might be mooted by an acquittal following a second trial on the merits. On the other hand, should the court of appeals affirm his convictions after imposition of sentence, petitioner will then be able to submit his present contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

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[1]It is now over three years since the return of the indictment. Further interlocutory review at this time would cause additional delay in the final disposition of the case.

[2]In criminal cases, a final judgment is not entered until sentence is imposed. *Berman* v. *United States*, 302 U.S. 211, 212 (1937).

[3]Because this case is interlocutory, we are not responding on the merits to the questions presented in the petition. Petitioner's principal contentions, however, are answered in detail in the opinions of the court of appeals (Pet. App. 1a-35a). We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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